

Current Issues in Federal Prosecutions and Padilla Strategies

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Cooperation Between Immigration Advocates and Federal Defenders



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What Federal Defenders Can Do

- Collateral Attacks on Removal Orders
- Collect Evidence
- Litigate the Categorical Approach

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Collateral Attacks on Removal Orders

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8 U.S.C. 1326

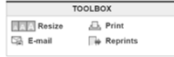
- 15,894 Felony Entry and Reentry Sentencings in FY2017
- Mean Sentence: 12 months.
- <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/Table50.pdf>

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RICHMOND

Immigration Agents Arrest 33 Workers in Raid at Site of New U.S. Courthouse

By Pamela Constable
Washington Post Staff Writer
Thursday, May 8, 2008



Federal immigration agents raided the construction site of a new federal courthouse in Richmond on Monday, arresting 33 workers on charges of violating federal immigration laws and being in the United States illegally, officials said yesterday.

NATURE OF THE INVESTIGATION

- 4. May 7, 2008, at approximately 8:00 a.m. at 701 East Broad Street, Richmond, Virginia, Hugo Dominguez-Cano was encountered within the Eastern District of Virginia and placed under administrative arrest by agents of the Immigration and Customs Enforcement for Immigration violation.

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8 U.S.C.1326 Removal Element

"[A]ny alien who . . . has been denied admission, excluded, deported, or removed . . ."

-8 U.S.C. 1326(a)

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Due Process Right to Collateral Attack

[W]here a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be some meaningful review of the administrative proceeding.

United States v. Mendoza-Lopez, 481 U.S. 828, 837-38 (1987)

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Jurisdiction **VOID** ing Provision

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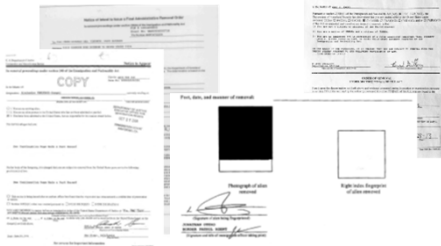
Time Bars **VOID** ons to Reopen

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No **VOID** Amendment
Sixth Amendment
Lawyer

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The Problem



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Removal Proceedings before an Immigration Judge



8 U.S.C. § 1229
Must allege:
- nature of the proceedings
- legal authority under which proceedings conducted.
- acts or conduct alleged to be in violation of law.
- charges against the alien and statutory provisions alleged to have been violated.

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<p>Expedited Removals at the Border 8 USC 1225, 8 U.S.C. 1225, 8 CFR 235.3</p> <p>Prerequisites</p> <ul style="list-style-type: none"> Arriving alien. 8 USC 1225(b)(1)(A)(i), or Alien encountered within 100 air miles of the border and have not established that in US for 14 days. 8 USC 1225(b)(1)(A)(ii)(I), 8 CFR 488.7 <p>Grounds of inadmissibility See 8 USC 1225(b)(1)(A)(i), 8 CFR 235.3(b)(1). Can only allege:</p> <ul style="list-style-type: none"> 8 USC 1182(a)(6)(C) (false statements or false claim to citizenship) or 1A)(7)(not in possession of valid entry docs). 	<p>Arrest and Detention Mandatory detention, can only parole for medical or law enforcement reasons. 8 CFR 235.3(b)(2)(ii)</p> <p>Interview, 8 CFR 235.3(b)(2)(iii)</p> <ul style="list-style-type: none"> Officer must read all information in Form I-867A. RIGHT TO TRANSLATION. 8 CFR 235.3(b)(2)(iii) Interrogation regarding identity, allegiance, and inadmissibility Notice of charge of inadmissibility and right to respond Record answers on I-867B Read back answers Alien shall sign and initial each page of the statement <p>Asylum Screening and Application</p> <ul style="list-style-type: none"> Referral to asylum officer Right to appeal to IJ, etc. Right to attorney <p>Removal Order</p> <ul style="list-style-type: none"> Form I-860, Notice and Order of Expedited Removal Alien shall sign reverse of form Review by supervisor. 8 CFR 235.3(b)(7). <p>WITHDRAWAL OF APPLICATION FOR ADMISSION</p> <ul style="list-style-type: none"> 8 U.S.C. 1225(a)(4). 8 CFR 235.4 At any time. Discretion of AG Should be able to depart immediately Factors: <ul style="list-style-type: none"> Pre 2014: Field Inspector's Manual Post 2014: Computer Form I-275 Request Narrowed Statistics - subpoena or FOIA to CBP 	<p>WITHDRAWAL OF APPLICATION FOR ADMISSION</p> <p>Department of Homeland Security</p> <p>Application for Withdrawal of Application for Admission</p> <p>File No. _____ Date _____</p> <p>Signature of Applicant _____</p> <p>Signature of Asylum Officer _____</p>
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Administrative Removals
(8 USC 1228(b), INA 238)

Notice of Intent Prepared
8 C.F.R. 238.16(b)(1) and (2)
8 U.S.C. 1228(b)

- Must allege:
 - Allegance
 - Non-FPE
 - Conviction(s)
 - That connects to aggravated/felony(ies)
- Must advise:
 - Right to counsel
 - Right to request withdrawal
 - Right to rebut within 30 days
 - Right to designate a representative

Response
8 C.F.R. 238.16(c)

- designate a representative
- indicate whether requesting a change
- must request specific evidence
- request opportunity to review evidence
- request withdrawal
- request admission
- (NO PREVIOUS ALLOWING) CHALLENGE TO FINAL CONCLUSION

Decision
8 C.F.R. 238.16(d)

- Standard: whether deportable by class, conviction, and temporal evidence. 8 C.F.R. 238.16(d)(2)
- Aggravated felony conviction (aggravated felony, 8 CFR 238.16(d)(4))
- May apply self-defense
- Must serve 30-day notice
- Must keep record of proceedings including all evidence in support of the charge. 8 U.S.C. 1228(b)

Termination
8 U.S.C. 1228

Order of Removal

Final Administrative Removal Order
Form with fields for Name, Date, and Signature.

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Case: Ramon Beltran-Sandoval

- Arrived with parents at age two
- Father alcoholic, jumped bail and abandoned family
- Attended school in US, graduated HS
- Adjusted status to LPR at 19
- Attempted to naturalize, delayed and misdelivered RFEs
- Marries; daughter born after 2 previous miscarriages; daughter has developmental delays and speech impairment
- Pled guilty to ADW, 3 year sentence
- Daughter, sister visit in prison
- IJ Hearing:
- Charge: aggravated felony (COV)
- "I do not find that you are eligible for any forms of relief from removal, and I hereby order your removal to Mexico on the charge contained in the notice to appear."
- Exhibits

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Case: Ramon Beltran-Sandoval

- Issues:
- Aggravated felony?
- LPR bar?
- Departure requirement?
- Equal Protection?
- Due Process / Arbitrary and Capricious?
- Denial of N-400?

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Case: Pedro Gonzalez-Moran

- Arrived without inspection in 1981 at age 20
- Adjusted to LPR 1990 (amnesty)
- 1996 – 2 convictions for Cal. Veh. Code 10851 (taking/driving car)
- 16 month sentence
- Released without removal proceedings
- 2 daughters, both with chronic medical problems under care of doctor in San Diego
- 1996: IIRIRA retroactively makes his convictions aggravated felonies (arguably)
- Removals:
 - 2003 IJ found Agg Felony, denied 212(c) and cancellation under Matter of Jean
 - 2005 Expedited removal
 - In Julian, California
 - 2006 IJ removal – entry without inspection

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Case: Pedro Gonzalez-Moran

- Issues:
 - Not Deportable as Charged
 - Eligible for Relief – erroneously denied
 - Matter of Jean didn't apply
 - Expedited Removal
 - No jurisdiction

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Case: Antonio Lopez-Valle

1. You are not a citizen or national of the United States.
2. You are a native of MEXICO and a citizen of MEXICO
3. You entered the United States (at/near) xxxx on or about 1995
4. At that time you entered, you were not admitted, inspected or parole by an Immigration Officer.
5. You are not lawfully admitted for permanent residence.
6. You were, on September 12th, 2003, convicted in the SUPERIOR Court of CHATTAHOOCHEE COUNTY, GA. for the offense of TRAFFICKING METHAMPHETAMINE in violation of Georgia State Laws (O.C.G.A. 16-13-331). for which the term of imprisonment imposed was 30 YEARS 0 MONTHS 0 DAYS.

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Right to Counsel in Expedited Removal Proceedings

NONPROFIT IMMIGRATION ORGANIZATIONS AND LAW SCHOOL IMMIGRATION CLINICS
Amicus Curiae.

LAW PROFESSORS, IMMIGRATION SCHOLARS, AND CLINICIANS
Amicus Curiae.

LAW PROFESSORS
Amicus Curiae

Immigrants, Plaintiff-Appellee.
ACLU IMMIGRANTS' RIGHTS PROJECT, ACLU OF NORTHERN CALIFORNIA, ACLU OF SOUTHERN CALIFORNIA, ACLU OF SAN DIEGO & IMPERIAL COUNTIES, AMERICAN IMMIGRATION COUNCIL and NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD
Amicus Curiae.

Amicus Curiae
IMMIGRATION REFORM LAW INSTITUTE
Amicus Curiae.

February 7, 2017

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Right to Counsel in Expedited Removal Proceedings

08/22/2017 81
2 pg 39.1 KB

Filed Order for PUBLICATION (HARRY PREGERSON, JAY S. BYBEE and N. RANDY SMITH) Appellant's petition for panel rehearing is hereby GRANTED. The opinion and dissent filed February 7, 2017, Nos. 14-50393 and 14-50394, and appearing at 847 F.3d 1124, are withdrawn. It shall not be cited as precedent by or to any court of the Ninth Circuit. A memorandum disposition is being simultaneously filed with this order. Judge Pregerson concurs in the judgment. No further petitions for panel rehearing or rehearing en banc will be entertained in this case. [10552918] [14-50393, 14-50394] (RMM) [Entered: 08/22/2017 08:45 AM]

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Collecting Evidence

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Example: FOIA vs. Rule 16 Discovery

7) Threat posed to the United States:
(b) (7)(C)
(b) (7)(E)

****NOTE: Discretionary authority should generally not be exercised if a threat is posed to the United States.**

REMARKS:

FOIA

Rule 16

7) Threat posed to the United States:

Foreign Affiliations or Ties: Yes No
 Criminal History: Yes No
 Recent/Significant Criminal Threat: Yes No
 Likely to Add to Illegal Population: Yes No
 Other Goodbye Threat: Yes No

****NOTE: Discretionary authority should generally not be exercised if a threat is posed to the United States.**

REMARKS:

LIKELY TO ADD TO ILLEGAL POPULATION

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U.S. Department of Justice
Immigration and Customs Enforcement
U.S. Border Patrol

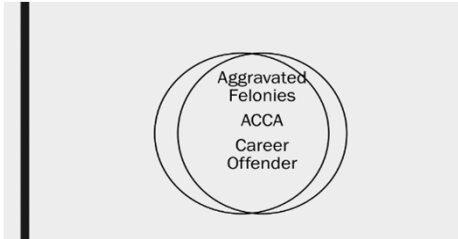
I write pursuant to the Court's order that the United States, prior to trial, provide defendant with information regarding the kidnapping of non-United States citizens in Mexico. The Omega Group was created in 2009 and is part of the International Liaison Unit of United States Border Patrol. It was created in response to reports of kidnappings, robberies, and other similar crimes against non-United States citizens occurring at or near the boundary with the United States. If an individual apprehended by USBP reports that he was kidnapped or robbed in Mexico, the Omega Group is contacted. The Omega Group will respond

- If the money is not sent within a specified amount of time, the kidnapers physically assault the individuals, and then again contact the family in the United States by phone.
- Once the family has paid the ransom money, the kidnapped individual is released from the location where he is being held.
- Up until approximately three months ago, the kidnapers told the individuals to walk north toward the United States. More recently, however, kidnapped individuals have reported being told to walk back into Mexico after they were released.

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Categorical Approach Litigation

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Recent Examples

- United States v. Valdivia-Flores, 876 F.3d 1201 (9th Cir. 2017): Washington aid/abet overbroad and indivisible.
- Lorenzo v. Sessions, No. 15-70814 (9th Cir. Aug. 29, 2018): California meth overbroad and indivisible
- Harbin v. Sessions, 860 F.3d 58 (2d Cir. 2017) and
- United States v. Townsend, 897 F.3d 66 (2d Cir. 2018): New York 5th Degree Sale C/S overbroad and indivisible

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Padilla Advisal Practice in Federal Court

"The problem with the feds is, they investigate first and indict second."

- AFD Chris Flood, 2014



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Padilla Advisal Practice in Federal Court (cont.)

Other challenges

- Fewer safe harbors; few misdemeanors period
- (Almost) no drug mismatches! ("Scheduled Listed Chemical Prods." under 21 U.S.C. § 952(a)?)
- Limited sentence bargaining

Some viable mitigation strategies

- Loss amount, restitution & "relevant conduct" sentencing. See *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009) (loss must be "tied to the count of conviction"); 18 USC § 3663(a) (restitution to non-victims or for non-convicted conduct per plea agreement)
- Arcane immigration offenses: e.g. 8 USC § 1304(e); 1306(a),(b) (non-willful) but see 8 USC 1227(a)(3)(A)
- FFOA, 18 USC § 3607
- Misprision of a felony (CIMT – *Matter of Mendez*, 27 I&N Dec. 219 (2018); use caution for financial/property crimes)
- Don't forget the C.F.R.!

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Padilla & Federal Post-Conviction Relief

- Vehicles:
 - 28 U.S.C. § 2255
 - Custody
 - AEDPA restrictions
- Writ of *coram nobis*
 - diligence
- [Withdrawal of plea under Fed. R. Crim. P. 11(d)]

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Post-Conviction Relief in Fed Ct., cont'd

- Retroactivity:
- Some circuits had held affirmative misadvice re: imm. was IAC pre-Padilla. E.g. US v. Couto, 311 F.3d 179 (2d Cir. 2002); US v. Castro-Taveras, 841 F.3d 34 (1st Cir. 2016); US v. Chan, 792 F.3d 1151 (9th Cir. 2015)
- Required R.11 warning or standard plea agreement warning may defeat prejudice. E.g. US v. Kayode, 777 F.3d 719 (5th Cir. 2014). But see US v. Rodriguez-Vega, 797 F.3d 781 (9th Cir. 2015); US v. Akinsade, 686 F.3d 248 (4th Cir. 2012) (misadvice)
- Lee v. US, 137 S. Ct. 1958 (2017) potentially undoes a lot of bad prejudice law re: "overwhelming evidence"

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ICE Custody and Federal Prosecution



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Dueling Priorities on Fed. Crime and Removal

Jan. 25 Exec. Orders; Feb. 25 Kelly Memos;
Apr. 11 Sessions Memo

Restrict parole, esp. under 8 USC § 1225(b)
Report on all noncitizens in USMS/BOP custody
Prioritize removal of 8 USC § 1182(a)(2)/1227(a)(2) categories and noncitizens who have committed crimes/been charged with crimes "where such charges have not been resolved"

But also

Charge every immigration crime you can
Seek judicial orders of removal at sentencing

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Federal Criminal Bail Bail Reform Act

18 U.S.C. § 3141 et seq. ("BRA")

- Strong presumption of release under least restrictive conditions necessary
- Government burden to show flight risk/danger
- Compared to state & immigration bail/bond, generally restrictive conditions

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Detainers and Flight Risk

- BRA is concerned only with risk of voluntary flight
 - E.g., *US v. Ailon-Ailopn*, 875 F.3d 1334 (10th Cir. 2017)
 - *US v. Martinez-Patino*, 2011 WL 902466 (N.D. Ill. Mar. 14, 2011)
- Gov't burden to show it cannot defer removal by d. ct. injunction, surrender of travel docs., or using "departure control order" per 8 CFR § 215.2, 215.3(g)
 - E.g., *US v. Castro-Inzunza*, 2012 WL 6622075 (9th Cir. Jul. 23, 2012)

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Removal and Federal Prosecution: The Irrational Executive

- "It was DHS that referred Defendant to the U.S. Attorney's office for prosecution. The Court cannot contemplate why the two Executive Branch agencies that began a concerted effort to deal with Defendant suddenly changed course." *United States v. Resendiz-Guevara*, 145 F. Supp. 3d 1128, 1135 (M.D. Fla. 2015)
- "[D]oes the Government really expect this court to believe that, after the Department of Justice has spent almost two years and considerable resources (both locally and at main Justice) to effectuate the extradition of the defendant and a number of his co-defendants in this high-profile criminal prosecution, [DHS] would simply thumb its nose at Justice and remove defendant? *US v. Brown*, ___ F. Supp. 3d ___, 2017 WL 3310689, at *6 (D.N.D. Jul. 31, 2017)

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The Irrational Executive, cont'd

- US v. Trujillo-Alvarez, 900 F. Supp. 2d 1167 (D. Or. 2012)
- D. Ct. can't prevent ICE from detaining/deporting, but gov't must choose: if prosecuting, must abide by BRA

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Trujillo-Alvarez & Progeny, cont'd

- "[T]he Court holds that the Government has to make a choice when it is dealing with a removable criminal defendant. It can forego prosecution, and detain and remove the person . . . Or it can prosecute. . . . What it cannot do is treat the United States Code like a take-out food menu whereby the Government can mix-and-match from column A (prosecution or removal) and column B (BRA or ICE detention rules)." US v. Galitsa, No. 17-cr-324-VEC (SDNY Jul. 28, 2017) (slip op., dkt # 30 on Pacer).

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Trujillo-Alvarez: BRA trumps INA?

- No categorical bail exemption in BRA based on immigration status
- 18 USC 3142(d): Non-USC/LPR shall be detained ≥ 10 days & "the attorney for the Government [shall] notify . . . the appropriate official of the Immigration and Naturalization Service. If the official fails or declines to take such person into custody during that period, such person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending . . . deportation or exclusion proceedings.

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Trujillo-Alvarez: Some Common Government Objections

- (See July 2017 USAO Bulletin (Vol. 65, No. 4), at 43-51)
- ICE detention mandated by 8 USC §§ 1225(b), 1226(c), 1231(a)
- ICE has no discretion not to reinstate/not to lodge detainer
- USAO powerless to affect ICE's decisions to detain or deport
- "Departure control" only restricts voluntary exits from U.S.
- D. Ct. may not enjoin ICE or IJ to release Δ/halt proceedings per 8 USC 1252(g) or other provisions

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Trujillo-Alvarez: Other Authority

- US v. Adomako, 150 F.Supp.2d 1302, 1307 (M.D. Fla. 2001); Galitsa, supra; US v. Rosario-Ventura, No. 17-cr-418-DLI (EDNY Nov. 3, 2017); see also Galitsa slip op., supra, at n.4 (collecting other cases) – many of these from outside CA9
- Only CA2 has weighed in: US v. Rosario-Ventura, --- F. App'x ---, 2018 WL 4224333 (2d Cir. Sept. 6, 2018) (summary order remanding for clarification)
- Stay tuned!
- Argument can also be brought as § 2241

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Zero Tolerance and Operation Streamline

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Because we need some good news...



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Operation Streamline Comes to California



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Operation Streamline Comes to California

Are there two misdemeanor courts?



One for brown people?



One for college students smoking pot at national parks?

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Sixth Amendment & Streamline

- 5-20 minutes per client?
- OTS clients?
- No confidentiality?
- Lack of discovery?
- Ethical issues in pleading?
- BP interference?
- Plea is coerced?

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What About Bail?



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Asylum is Defense to § 1325?



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Asylum is Defense to § 1325?

Article 31(1) of the 1951 Convention Relating to the Status of Refugees:

"The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

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§ 1325 and § 1326 are Unconstitutional!



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§ 1325 and § 1326 are Unconstitutional!

- In *Morales-Santana v. Sessions*, 137 S. Ct. 1678 (2017), the Supreme Court held that citizenship statute violates equal protection by treating children of unwed mothers and unwed fathers differently
- Because our citizenship laws violate equal protection, and § 1325/§ 1326 is based on our citizenship laws, no person can be convicted of illegal entry or reentry

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Pereira Defense to § 1326 Prosecution?

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:

_____ (Complete Address of Immigration Court, including Room Number, if any)
on a date to be set at a time to be set to show why you should not be removed from the United States based on the
(Date) (Time)
charges set forth above. DANIEL C. CORRAL SDOO *[Signature]*

(Signature and Title of Issuing Officer)

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Questions? Comments?

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